Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DOUGLAS A. BOONE, DENYSE ANNE BOONE, and ANTHONY TROY BOONE,

Petitioners,

v.

GEORGE FISHER, M.D., PHILIP J.A. WILLMAN, M.D., and NEUROSURGERY, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRTEENTH COURT OF APPEALS OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Whether a state court may deny a party a complete record of his hearing without notice to the party who had requested the record to be prepared.

Whether an official court reporter is a state official for purposes of determining whether the state has arbitrarily denied a party a recognized right.

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The Thirteenth Court of Appeals for the State of Texas issued its opinion on January 28, 1999 (Appendix A), and it overruled a motion for rehearing on June 22, 2000 (Appendix B). *Douglas A. Boone, et al. v. George Fisher, M.D., et al.*, Cause No. 13-96-001-CV, Thirteenth Court of Appeals, State of Texas (not designated for publication).

The Supreme Court of Texas denied a petition for review on September 14, 2000 (Appendix F), and it overruled a motion for rehearing from denial of petition for review on November 2, 2000. (Appendix G) *Boone v. Fisher, et al.*, Cause No. 00-0817 in the Supreme Court of Texas.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denial of petition for review was dated November 2, 2000. (Appendix G) This Honorable Court has jurisdiction under 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS

United States Const. Amend. 14

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Constitution Art. 1, sec. 13.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

STATUTES

Each judge of a court of record shall appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court.

TEX. GOV'T CODE ANN. § 52.041.

(a) An official court reporter must take the official oath required of officers of this state.

(b) In addition to the official oath, each official court reporter must sign an oath administered by the district clerk stating that in each reported case the court reporter will keep a correct, impartial record of:

> (1) the evidence offered in the case;
>
> (2) the objections and exceptions made by the parties to the case; and
>
> (3) the rulings and remarks made by the court in determining the admissibility of testimony presented in the case.

TEX. GOV'T CODE ANN. § 52.045.

TEX. GOV'T CODE ANN. § 52.046 (Duties of Court Reporters) (contained in Appendix)

STATEMENT OF THE CASE

Petitioners appealed from an adverse judgment signed on September 1, 1995. On November 16, 1995, they filed a request with the official court reporter for the statement of facts. That record was prepared and filed, but it omitted numerous bench conferences.

Petitioners requested the Thirteenth Court of Appeals for the State of Texas to abate the appeal on the grounds the record was incomplete. On April 25, 1996, the Thirteenth Court of Appeals remanded for a hearing on the accuracy of the record.

On July 16, 1996, the trial court conducted a hearing on the accuracy of the record. It found the Petitioners failed to request transcription of the bench conferences and the record was accurate.

Petitioners filed a Motion for Reversal and Remand Due to Incomplete and Inaccurate Statement of Facts on August 14, 1996, in the Thirteenth Court of Appeals, Nueces County, Texas. The Thirteenth Court of Appeals denied the motion by opinion on January 28, 1999, holding the Petitioners failed to specifically request transcription and Petitioners waived constitutional complaints.

Petitioners filed a petition for review in the Supreme Court of Texas. The Supreme Court of Texas denied the petition without opinion on September 14, 2000, and it overruled a motion for rehearing without opinion on November 2, 2000.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case presents the important constitutional question of whether a party is due notice from the court officials that material is not being recorded. Due process prohibits the state or its officials from acting arbitrarily or capriciously to deprive a person of rights otherwise conferred by the state. The requirements of due process are flexible and depend on a balancing of the interests affected by government action. *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

This case concerns the constitutional requirements for fair notice of state court procedures and acts by state officials. Petitioners were deprived of any effective appellate remedy by the unannounced failure of the court reporter to record bench conferences. Rather than address the failure and the lack of notice to Petitioners, which was contrary to her duty

under statute and against the specific request of the Petitioners, the state courts simply discarded the case on the grounds Petitioners somehow waived something they had requested.

Texas recognizes a state constitutional right to appeals for civil litigants, and freely provides for those appeals by statute and rule. *Dillingham v. Putnam*, 109 Tex. 1, 3-4, 14 S.W. 303, 304-05 (Tex. 1890). Once the state creates a right, it may not deny that right to a person arbitrarily. *M.L.B. v. S.L.J.*, 512 U.S. 102, 110, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). A right to appeal, once granted, may not be render useless by requirements making the procedure completely ineffective. *Id.*

Texas undeniably has a legitimate interest in the method in which it regulates judicial proceedings. Significantly, that interest is shown by the statutory requirements of court reporters to record evidence and rulings and comments of the court regarding admissibility of testimony.

Petitioners were arbitrarily denied the right to effectively appeal from an adverse judgment entered in state court by failure of the court reporter to record conferences without notice to Petitioners. Rather than examine the testimony concerning the fact that the court reporter arbitrarily determined when to record bench conferences and when not to and testimony concerning the fact that Petitioners were not notifying of her act, the state courts simply disposed of Petitioners' complaints on the theory that Petitioners waived both the right to a record and the constitutional complaint. App. A (Slip op. at 7-8).

B. Denial of constitutionally protected right of appeal

Although the Federal Constitution guarantees no right to appellate review, once a State affords that right, the State may not "bolt the door to equal justice." *M.L.B. v. S.L.J.*, 512 U.S. 102, 110; 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (Frankfurter, J., concurring in judgment)).

Texas recognizes that a right to appeal is protected by its constitution. *Dillingham v. Putnam*, 109 Tex. 1, 3-4, 14 S.W. 303, 304-05 (Tex. 1890). There, the court stated:

> "Due course of law," in a cause tried in a district court, means a trial according to the settled rules of law in that court, and a further hearing in this court, if either party to the litigation desires it after a final judgment in the trial court. A law which practically takes away from either party to litigation the right to a fair and impartial trial in the courts provided by the constitution for the determination of a given controversy, denies a remedy by due course of law.

Id.

Federal due process forbids the state from arbitrarily excluding certain parties from exercising rights it has created. *Evitts v. Lucey*, 469 U.S. 387, 401; 105 S. Ct. 830, 840, 83 L. Ed. 2d 821 (1985); *Griffin v. Illinois*, 351 U.S. 12, 17-20, 76 S. Ct. 585, 589-91, 100 L. Ed. 891 (1956). Furthermore, due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his

appeal." *Evitts, supra*, 105 S. Ct. at 841. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5, 102 S. Ct. 1148, 1154-55 & n.5, 71 L. Ed. 2d 265 (1982). A state would deny a defendant such a "fair opportunity" if it reduced the appeal to a "meaningless ritual" by denying him the means effectively to press his appellate arguments, *Douglas v. California*, 372 U.S. 353, 358, 83 S. Ct. 814, 817, 9 L. Ed. 2d 811 (1963) (right to counsel in criminal appeals). *See also Evitts, supra* (right to effective assistance of counsel in criminal appeals).

Federal courts have previously prevented state courts from denying appeals by applying onerous bonding requirements. This Honorable Court stated a state may not terminate parental rights and deny a party an appeal due to indigency. *M.L.B.*, 512 U.S. at 110. Texas's supersedeas requirements on appeal have been subjected to due process attack.

> It is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness. *Cf. National Socialist Party v. Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 1324-25, 96 S.Ct. 237, 239-40, 46 L.Ed.2d 199 (1975) (Blackmun, J., in chambers); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305, 95 S.Ct. 1, 3, 42 L.Ed.2d 17 (1974) (Powell, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203, 92 S.Ct. 752, 753, 30 L.Ed.2d 769 (1972) (Powell, J., in chambers).

Texaco v. Pennzoil, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 467 U.S. 1 (1987) (*Younger* doctrine required abstention where party failed to exhaust state remedies).[1]

Petitioners' ability to appeal from the adverse judgment has been rendered futile by the court reporter's act of failing to record proceedings without notifying Petitioners of her action. They had numerous complaints about evidentiary rulings they could not make on appeal due to the court reporter's deliberate failure to record the bench conferences. Moreover, any allegation of bias on the part of the trial court was lost by the failure to provide a complete record, including the omitted conference in which the trial court told defense counsel what evidence should be emphasized to the jury. Such a complaint on appeal requires the total record for review. *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App. – Houston [1st Dist.] 1994, writ denied), *cert. denied*, 116 S. Ct. 186, 133 L. Ed 2d 124 (1995).

C. The Court Reporter is an Officer of the State

The official court reporter is empowered by the state to perform her duties.

Each judge of a court of record shall appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court.

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1. The *Younger* abstention doctrine does not apply in this case, as Petitioners have exhausted their remedies on appeal in the Texas courts.

TEX. GOV'T CODE ANN. § 52.041. She is placed under the same oath as any other state official.

(a) An official court reporter must take the official oath required of officers of this state.

(b) In addition to the official oath, each official court reporter must sign an oath administered by the district clerk stating that in each reported case the court reporter will keep a correct, impartial record of:

(1) the evidence offered in the case;

(2) the objections and exceptions made by the parties to the case; and

(3) the rulings and remarks made by the court in determining the admissibility of testimony presented in the case.

TEX. GOV'T CODE ANN. § 52.045.

Her oath requires her to record rulings and remarks made by the court in determining the admissibility of testimony presented in the case. She deliberately failed to perform that duty in choosing as a general practice to not record bench conferences.

D. The Court Reporter's Failure to Record Proceedings

While no party to the case specifically or formally requested that a record of the ten-day trial be made, the court reporter appeared at her station and remained there throughout the proceedings. Supp. R.R. Vol. III, p. 38.

When defense counsel once asked to go off the record on a matter, Boone's counsel specifically stated that he wanted everything on the record. Supp. R.R. Vol. II, pp. 35, 37-38.

The court reporter took down all of the testimony of the witnesses and some of the bench conferences. R.R. Vol. VII, p. 30, Vol. VIII, pp. 344, 369, 394, 533, Vol. XI, p. 1172, Vol. XIV, p. 2172. However, without any apparent reason, she failed to take down a number of other bench conferences, some of which contained objections to evidence and rulings on those objections. R.R. Vol. VI, pp. 19, 24, 83, Vol. VII, p. 126, Vol. IX, pp. 745-46, Vol. X, pp. 1078, 1090, Vol. XI p. 1411, Vol. XIII, pp. 1932, 1934, Vol. XIV, pp. 2054, 2248, Vol. XV, pp. 2479, 2481, 2487.

According to the uncontroverted testimony of counsel for the Boones, there was no impediment to the court reporter hearing the bench conferences and taking them down. Supp. R.R. Vol. II, pp. 11-12, 35, 37-38. The court reporter testified that the only way that the parties would have known that she had ceased taking down the proceedings was if they watched her fingers. Supp. R.R. Vol. III, p. 33. But the court reporter's fingers cannot be observed from most places in the courtroom, including where the attorneys stood during bench conferences. Supp. R.R. Vol. II, pp. 12-13. The attorneys testified without contradiction that they had no idea that the court reporter was not taking down some bench conferences and did not have reason to object. Supp. R.R. Vol. II, p. 12-13, 35. As the Thirteenth Court of Appeals succinctly stated, "To signify that she is going 'off the record,' she stops writing but does not say anything." App. A, Slip op. at 4.

The bench conferences contained a number of rulings concerning the admissibility of the evidence. Supp. R.R. Vol. II, pp. 24, 35-36. In one bench conference, the trial court told defense counsel that certain evidence needed to be emphasized to the jury. Supp. R.R. Vol. II, p. 37. Petitioner's counsel testified that there were several matters that were determined in bench conferences that he wanted to review for purposes of drafting and briefing points of error. Supp. R.R. Vol. II, p. 37. Even the fact that bench conferences were being conducted too loudly had been the subject of an objection that might have been a matter for review. Supp. R.R. Vol. II, 38.

While counsel testified that he did not object to the court reporter's failure to take down the proceedings, he repeatedly stated that he never considered an objection necessary because the court reporter appeared to be taking down the proceedings, and he did not learn of the omissions until the statement of facts was on file. Supp. R.R. Vol. II, pp. 38, 42-43. All of the testimony regarding the court reporter's presence and demeanor, and counsel's specific efforts to observe the court reporter and obtain a statement of facts is uncontroverted.

CONCLUSION

A state official, the court reporter for the 319th District Court, has, without notice to the Petitioners, prevented them from pursuing appellate avenues in a state court proceeding. Such action is violative of Petitioners' due process rights, as she is a state official who denied Petitioners the means with which effectively to pursue appellate remedies.

In this case, Petitioners had no opportunity to discern that a request for having all proceedings transcribed was not being followed. The State of Texas can have no rational reason for countenancing the official court reporter's giving no notice to parties that she has stopped recording the proceedings, especially when a statute requires her to record those proceedings. Due process requires at least notice of the refusal to record the proceedings, so that the party may take steps to cure the record deficiency.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS, CORPUS CHRISTI DATED JANUARY 28, 1999

NUMBER 13-96-001-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

DOUGLAS A. BOONE, DENYSE ANN BOONE, AND ANTHONY TROY BOONE,

Appellants,

v.

GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., AND NEUROSURGERY, P.A.,

Appellees.

On appeal from the 319th District Court of Nueces County, Texas.

OPINION

Before Justices Dorsey, Hinojosa, and Yañez
Opinion by Justice Dorsey

Douglas, Denyse Ann, and Anthony Troy Boone, plaintiffs in the trial court below, appeal from the judgment entered in favor of appellees George Fisher, M.D., Philip J.A. Willman, M.D., and Neurosurgery, P.A., in the Boones' suit against them for medical malpractice. The Boones bring

forty-seven points of error complaining of errors in the statement of facts, errors by the trial court in evidentiary rulings, errors in the voir dire, jury impanelment, and jury charge, sufficiency of the evidence to support the jury's verdict, and improper bias on the part of the trial court. We affirm.

Background

Douglas Boone sought treatment from Dr. George Fisher, an ear, nose, and throat specialist, for nasal polyps. Dr. Fisher performed polypectomy surgery on Mr. Boone on January 9, 1990. In May 1990, Mr. Boone suffered a leak of cerebral spinal fluid (CSF) due to an opening in his cribriform plate, which is the bone structure separating the nasal cavity from the brain case. The Boones allege Dr. Fisher created this leak during the polypectomy.

Dr. Fisher consulted with Dr. Willman, a neurosurgeon, concerning the proper course of treatment for Mr. Boone. In December 1990, after Mr. Boone had endured several hospitalizations and bouts of meningitis, Dr. Willman performed a craniotomy to repair the CSF leak. That procedure involves surgically opening the skull, lifting the frontal lobe of the brain, and patching the cribriform plate from above. Mr. Boone claims he suffers frontal lobe brain damage as a result of this surgery.

The Boones sued Dr. Fisher and Dr. Willman, as well as Neurosurgery, P.A.,[1] for negligence, gross negligence, and

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1. The Boones also sued Humana Hospital Corpus Christi and Doctors Regional Medical Center, but these defendants were dismissed prior to trial.

violation of the Texas Deceptive Trade Practices Act (DTPA). The defendants asserted Mr. Boone was negligent in failing to follow the doctor's medical advice, and thereby caused his own damages. After a jury trial, the jury returned a verdict favoring the defendants. The Boones filed a motion for new trial, which was denied after a hearing, and this appeal ensued.

Arguments on Appeal

A. Inaccurate Statement of Facts

By their first ten points, the Boones complain that the statement of facts from the trial is incomplete, asserting specifically that the court reporter failed to record several bench conferences and a courtroom exchange between the attorneys after the judge had left the bench but while some members of the jury were still present. This Court abated the appeal and remanded to the trial court to determine the completeness and accuracy of the record. After a hearing, the trial court found the record to be accurate and entered findings of fact accordingly.

Although approached via diverse points of error, the central issue is whether the court reporter, absent a specific request or objection, has a duty to report the conversations between counsel and the court at bench conferences outside the hearing of the jury. A related issue is whether the reporter has a duty to report exchanges between counsel after the judge has left the bench. We answer "no" to both.

At the hearing on the accuracy of the statement of facts, the court reporter testified she was present at the court

reporter's station throughout the trial, including during bench conferences. Describing her habits in some detail, she stated she did not record bench conferences in the present case, consistent with her usual practice not to do so unless specifically requested. She testified that she normally reports everything she hears, and if she heard something, it would be reflected in the statement of facts. Depending on the proceeding, she may ask speakers to talk louder if she cannot hear them. To signify that she is going "off the record," she stops writing, but does not say anything. She also testified that she stops taking notes at the end of the day "when the judge gets up out of his seat and we're off the record." Regarding this lawsuit, she testified that, to the best of her ability, she accurately recorded the proceedings at trial. At no time during the trial was the court reporter specifically asked to record a bench conference, and there was no objection that she was not recording. She opined that the statement of facts is accurate.

The Boones had two attorneys present for most of the trial, Mr. Cage Wavell and Ms. Deborah Sundermann. Mr. Wavell argued bench conferences, while Ms. Sundermann stood near the court reporter's station during them. Ms. Sundermann testified the court reporter appeared to be attentive to those conferences, and had she been aware the court reporter was not transcribing the bench conferences, she would have requested her to do so. She believed they were being recorded and the court reporter did not indicate in any way that they were not. At no time did either attorney for the Boones ask the court reporter to record bench conferences or object to the reporter's failure to do so. Both attorneys testified that rulings were made by the court during these conferences that were not recorded by the reporter.

Counsel also testified that, on one occasion, the trial judge recessed for the afternoon and was in the process of leaving the bench when her co-counsel attempted to get the court's attention by saying "Your Honor, your Honor." Opposing counsel, Mr. Ron Brin, then said something to the effect of "I can get his home phone number for you." Counsel testified she was surprised at this exchange, and specifically looked to see if any jurors were still in the jury box. She testified at least three jurors were still in the room when this exchange took place. This exchange was not contained in the statement of facts, although appellants' counsel claims the court reporter did not give any indication she was not recording.

Rule 11 of the former Texas Rules of Appellate Procedure provides that a court reporter has a duty to attend all sessions of the court and to make a full record of the evidence, together with all objections to the admissibility of the evidence, the rulings, and remarks of the court *when requested by the judge or any party to a case*. TEX. R. APP. P. 11(a)(1) (emphasis added).[2]

The government code imposes similar obligations on the court reporter. *See* TEX. GOV'T CODE ANN. § 52.046(a) (Vernon 1988). Section 52.046 requires the official court reporter, *upon request*, to attend all sessions of court, take

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2. This trial took place before September 1, 1997, the effective date for the current rules of appellate procedure. Because the court reporter's actions were governed by the former rules, we apply them here. The current rules of appellate procedure require the court reporter to "make a full record of the proceedings unless excused by agreement of the parties." TEX. R. APP. P. 13.1(a).

full notes of oral testimony offered before the court, including objections made to the admissibility of evidence, court rulings and remarks on the objections, exceptions to the rulings, and if requested to do so, take notes of the closing arguments, objections to the arguments, court rulings, and remarks.

In *Robinson v. Robinson*, 487 S.W.2d 713 (Tex. 1972), a witness testified in the trial judge's chambers, in the presence of counsel for both parties, but without a court reporter present. *Id.* at 714-15. No request was made for the court reporter to be present, and no objection was entered to the reporter's absence. *Id.* at 714. The supreme court held the failure of the appellant to request a reporter or object to the reporter's absence meant "[s]he is not in a position to complain . . . of her inability to obtain a transcript of the testimony in question and answer form." *Id.* at 715.

We do not believe the general request for a court reporter to be present and report court proceedings is a sufficiently specific request to cover bench conferences. By their very nature, conferences at the bench or proceedings in the judge's chambers, are not proceedings in "open court." Bench conferences are meetings between the trial judge and the attorneys to discuss certain matters outside of the hearing of the jury. *See* BLACK'S LAW DICTIONARY 141 (5th ed. 1979). If an attorney wants a record of a ruling made during a bench conference, he should either specifically request that the court reporter transcribe the bench conference itself, or step back from the bench and obtain a ruling in open court. As the supreme court has held:

Appendix A

> At every stage of the proceedings in the trial court, litigants must exercise some diligence to ensure that a record of any error will be available in the event that an appeal will be necessary. For example, the Texas Government Code does not require reporters to automatically record every proceeding, but provides that the court reporter will take notes of testimony "on request." TEX. GOV'T CODE § 52.046(a)(2) (1988). A litigant who fails to request that the reporter record pretrial proceedings risks waiver of any complaint with respect to error occurring during those proceedings.

Piotrowski v. Minns, 873 S.W.2d 368, 370-71 (Tex. 1993) (citations omitted).

We hold the trial court's findings that (1) the statement of facts is accurate and (2) that the Boones' attorneys did not properly request a record of the bench conferences and the exchange in open court are not against the great weight and preponderance of the evidence. *See Walthall v. State*, 594 S.W.2d 74, 81 (Tex. Crim. App. 1980) (objection is necessary to preserve error if bench conferences are not recorded); *see also Phillips v. State*, 701 S.W.2d 875, 894 (Tex. Crim. App. 1985). Points four through eight are overruled.

In their first three points, the Boones argue the trial court violated their constitutional rights to due process and "open courts" when it failed to require the court reporter to take down all proceedings, including all bench conferences and open court exchanges, and transcribe an accurate statement

of facts. In points nine and ten, the Boones argue former rule of appellate procedure 50(e)[3] violates their constitutional rights of due process and access to the courts if it operates to deprive them of a reversal and remand by this Court.

The Boones do not explain how the trial court violated their constitutional rights or discuss the constitutionality of Rule 50(e). The only constitutional reference in their argument on appeal is a general citation to the Fifth and Fourteenth Amendments to the United States Constitution and to sections 13, 19, and 29 in Article 1 of the Texas Constitution. This is not sufficient to meet the briefing requirements of rule of appellate procedure 74(f). Accordingly, these arguments are waived. TEX. R. APP. P. 74(f). Points one, two, three, nine and ten are overruled.

B. EVIDENTIARY POINTS

In points of error eleven through twenty-two, the Boones challenge various evidentiary rulings.

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3. Former rule 50(e) provides as follows:

> (e) Lost or Destroyed Record. When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts. Former TEX. R. APP. P. 50(e). See current TEX. R. APP. P. 34.6(f).

Appendix A

TESTIMONY OF DR. KARL SWANN

Points eleven through thirteen concern the testimony of Dr. Karl Swann, one of appellees' expert witnesses. During trial, the Boones attempted to elicit Dr. Swann's deposition testimony in which he related what he personally would have done had Mr. Boone had been his patient. The trial court excluded the deposition testimony.

By points eleven and twelve, appellant asserts the trial court erred by excluding portions of Dr. Swann's deposition.

The admission or exclusion of evidence is committed to the trial court's sound discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). An abuse of discretion occurs when the trial court acts without reference to any guiding rules and principles or, in other words, acts in an arbitrary or unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Hartman v. Urban*, 946 S.W.2d 546, 552 (Tex. App. — Corpus Christi 1997, no writ). For the trial court to abuse its discretion, there must have been only one reasonable decision, and the trial court must have gone against this decision. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Whenever testimony is excluded by a ruling of the trial court, the offering party must make a bill of exception in order to preserve error on appeal. *Ramirez v. Ramirez*, 873 S.W.2d 735, 741 (Tex. App. — El Paso 1994, no writ), citing *McInnes v. Yamaha Motor Corp.*, U.S.A., 673 S.W.2d 185,

187 (Tex. 1984); see also *Texas Elec. Utilities Co. v. Rocha*, 762 S.W. 275, 277 (Tex. App. — El Paso 1988, writ denied).

Our review of the record does not reveal the text or substance of the excluded testimony. Because the excluded evidence is not part of the record, we cannot determine if its exclusion, even if done in error, was harmful to appellant. Points eleven and twelve are overruled.

In their thirteenth point, the Boones challenge the ruling that Dr. Swann was not an adverse witness. Citing *Rojo v. State*, 629 S.W.2d 88 (Tex. App. — Dallas 1981, no pet.), they argue that because Dr. Swann was hired and paid by appellees and considered himself part of the "defense team," he was an adverse witness as defined by former rule of civil evidence 611.[4] The Boones further argue that, as an adverse witness, Dr. Swann was properly subject to cross-examination on his entire deposition, including the portions in which he testified regarding what he personally would have done to treat Mr. Boone.

Appellees do not respond to appellants' argument other than to assert that it is immaterial to the determination of whether Dr. Swann's testimony was admissible. We agree. Rule of civil evidence 611 merely states a witness may be cross-examined on any matter relevant to any issue in the case, and leading questions are permissible when interrogating an adverse witness. Former TEX. R. CIV. EVID. 611(b), (c). Whether Dr. Swann was an adverse witness is irrelevant to the issue whether Dr. Swann's testimony was properly

4. Current Texas Rule of Evidence 611; renamed without substantive change.

excluded. The trial court's ruling that Dr. Swann was not an adverse witness was neither an abuse of discretion nor against the great weight and preponderance of the evidence. Even had the ruling been improper, appellants have failed to show how the ruling affected the outcome of the case. TEX. R. APP. P. 81(b)(1). Point thirteen is overruled.

DAMAGES TESTIMONY

In points of error fourteen, fifteen, and sixteen, the Boones complain of the trial court's exclusion of portions of testimony by two witnesses, Boone's wife and Dr. Everett Dillman. Mrs. Boone was prevented from testifying regarding the effects of Mr. Boone's injuries on their marital relationship. Dr. Dillman, an economist, was prevented from testifying regarding Mr. Boone's future medical damages and the Boones' damages for loss of household services.

To prevail on appeal, appellants must show that the erroneous exclusion of evidence was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. TEX. R. APP. P. 81(b)(1); *Gee*, 765 S.W.2d at 396; *Padgett v. Bert Ogden Motors, Inc.*, 869 S.W.2d 532, 537 (Tex. App. — Corpus Christi 1993, writ denied).

The jury determined that neither Dr. Fisher nor Dr. Willman proximately caused Mr. Boone's injuries. Accordingly, any testimony on the issue of damages is wholly irrelevant to the determination of this appeal. Only evidence that relates to the negligence, if any, of Drs. Fisher and Willman, or the contributory negligence of Mr. Boone, could be relevant in determining whether the jury's verdict on

negligence was against the great weight and preponderance of the evidence. Points fourteen, fifteen, and sixteen are overruled.

OTHER MALPRACTICE CLAIMS

The Boones complain in point of error seventeen that the trial court erred in preventing them from presenting a portion of the videotaped deposition of Dr. Fisher in which he testified regarding other medical malpractice claims made against him. The trial court sustained appellees' objection that no predicate had been established for this evidence and excluded the video tape.

Citing our opinion in *Henry v. Felici*, 758 S.W.2d 836 (Tex. App. — Corpus Christi 1988, writ denied), the Boones argue the appellees opened the door to testimony regarding other malpractice claims against Dr. Fisher when they described Dr. Fisher during opening remarks as having a good reputation and being a "fine doctor.". The Boones also argue "lack of a predicate" is not a valid objection to the admissibility of the evidence.

Appellees assert the Boones waived error by failing to make a bill of exception or offer of proof regarding what the excluded deposition testimony would have revealed.

Former rule of appellate procedure 52 provided for bills of exception and offers of proof when the trial court excludes evidence. Former TEX. R. APP. P. 52(b).[5] Unless appellants

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5. Current TEX. R. APP. P. 33.2.

supply the substance of the excluded evidence on appeal and show how that evidence is relevant, they waive error. *Lopez v. Southern Pac. Transp. Co.*, 847 S.W.2d 330, 336 (Tex. App. — El Paso 1993, no writ); *Penwell v. Barrett*, 724 S.W.2d 902, 907 (Tex. App. — San Antonio 1987, no writ). To properly pass on the question of the exclusion of testimony, the record should indicate the questions that would have been asked, what the answers would have been, and what was expected to be proved by those answers. *Lopez*, 847 S.W.2d at 336; *Dames v. Strong*, 659 S.W.2d 127, 132 (Tex. App. — Houston [14th Dist.] 1983, no writ).

Citing *Reedy & Co. v. Jenkins & Co.*, 597 S.W.2d 62, 63 (Tex. Civ. App. — Dallas 1980, writ ref'd n.r.e.), the Boones respond that no bill of exception was necessary, as this was cross examination of an opposing party.

Appellants' reliance on *Reedy* is misplaced. The rule discussed there relates to exclusion of testimony during cross-examination of a live witness, when counsel does not know what the witness's answer to his questions will be. *See Reedy*, 597 S.W.2d at 63. In such situations, it would be nonsensical to require a party to make a bill of exception or offer of proof, because it "would require counsel either to speculate upon the answer of an adverse witness or deal unfairly with the court." *Id.* In the present case, however, the Boones were attempting to introduce testimony elicited during Dr. Fisher's deposition. The Boones knew the content of Dr. Fisher's answer to the deposition questions, and would not have had to speculate on what those answers were in order to make a bill of exception. We hold that in the present situation, appellants were required to make a bill of exception

or offer of proof pursuant to rule 52 in order to preserve error. By failing to do so, appellants have waived error on this point. Point seventeen is overruled.

INFORMED CONSENT TESTIMONY

In points eighteen and nineteen, the Boones argue the trial court erred in overruling their objections and admitting the testimony of Dr. Kevin Brown and Dr. Fisher regarding whether the written consent forms signed by Mr. Boone complied with the informed consent statute.[6] Dr. Brown, an ear, nose, and throat specialist called by appellees to testify on behalf of Dr. Fisher, testified he had reviewed the surgical consent form signed by Mr. Boone, and that the form complied with the statutory requirements. Dr. Brown testified, without objection, "the procedures were appropriately listed on the operative consent," and that Dr. Fisher "complied directly" with the statutory requirements regarding consent. When appellees' attorney asked if Dr. Fisher in fact went "further than is required by the state of Texas with respect to explaining the risks to patients," appellants objected that such an opinion called for a legal conclusion and invaded the province of the jury. This objection was sustained. Appellees next asked Dr. Brown:

> [MR. BARGER] Okay. Do you have an opinion as to whether or not, if Dr. Fisher informed Mr. Boone of those risks, as to whether he had to, in good medical practice — excuse me — whether he had to with respect to the statute to do so?

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6. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.01-6.07 (Vernon Supp. 1998).

[MR. WAVELL] Objection, Your Honor. That again calls for a legal conclusion.

[THE COURT] Overruled.

[MR. WAVELL] That's for the court to determine. Further, it invades the province of the jury.

[THE COURT] Overruled.

Dr. Brown proceeded to testify that, in his opinion, "the consent form was appropriate, and Dr. Fisher's instructions of further problems that could potentially occur with a surgery like this was appropriate, and I think it was entirely in place and in order."

Dr. Fisher also testified regarding the issue of informed consent. During his testimony, Dr. Fisher testified that the law requires physicians to submit a particular form to patients, informing them of specific risks, when surgery is planned. The form advises patients of particular risks as determined by the Texas Medical Disclosure Panel; this allows a patient to make an informed decision on whether or not to have the surgery performed. Dr. Fisher testified that he gives more warnings than those required by statute. When asked if he followed the requirements of the informed consent statute when advising Mr. Boone, appellants objected that the question called for a legal conclusion, but the objection was overruled. Dr. Fisher testified he "put everything that is required in this surgery on this legal form that we had signed."

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The Boones argue Dr. Brown's and Dr. Fisher's testimony invaded the province of the jury, and that the doctors were not qualified to make legal conclusions of this sort. Appellees argue that the Boones waived error by failing to object when Dr. Brown testified initially that Dr. Fisher appropriately listed the required procedures on the consent form and that he "complied directly" with the statutory requirements regarding consent. The Boones error was not waived because the initial testimony differed from the testimony objected to. We agree with appellees that the Boones have waived error on this point.

Objection is required every time inadmissible evidence is presented, and error in allowing inadmissible evidence is cured when the evidence comes in without objection elsewhere at trial. *Cavazos v. State*, 904 S.W.2d 744, 749 (Tex. App. — Corpus Christi 1995, pet. ref'd) (citing *Johnson v. State*, 803 S.W.2d 272, 290 (Tex. Crim. App. 1990)); *see* TEX. R. APP. P. 52(a); *Srite v. Owens-Illinois, Inc.*, 870 S.W.2d 556, 565 (Tex. App. — Houston [1st Dist.] 1993), *rev'd on other grounds*, 897 S.W.2d 765 (Tex. 1995) (To preserve error regarding the admissibility of evidence, a party must present a timely objection when the witness is presented to testify.).

Dr. Brown testified, without objection, that Dr. Fisher complied with the informed consent statute. The question to Dr. Fisher that drew appellants' objection was whether or not he followed the requirements of the statute when advising Mr. Boone of the risks of surgery. These two questions are identical, covering the same topic and eliciting the same response. Similarly, the question to Dr. Brown that drew

appellants' objection was whether or not the statute required Dr. Fisher to give the warnings that he did, and whether he complied with the statute. Dr. Brown had previously testified to this before appellants objected. We hold that by failing to object the first time Dr. Brown was asked this question, appellants waived error. Appellants' eighteenth and nineteenth points are overruled.

POST-OPERATIVE CARE INSTRUCTION

In point twenty, the Boones argue the trial court erred in excluding testimony from Dr. Willman regarding the standard of care for post-operative instruction. Specifically, the Boones hoped to elicit testimony that a neurosurgeon must instruct a patient in methods of coping with the potential consequences of brain damage following an unsuccessful craniotomy. The appellees objected to this testimony on the basis of relevance claiming that the Boones had not shown the craniotomy was unsuccessful. The Boones contend they need not prove that deficiencies in post-operative care caused Mr. Boone's brain damage, just that appellees' failure to follow the standard of care compounded his injuries. The admission and exclusion of evidence is committed to the trial court's sound discretion. *Gee*, 765 S.W.2d at 396. A person seeking to reverse a judgment based on evidentiary error need not prove that but for the error a different judgment would necessarily have been rendered, but only that the error probably resulted in an improper judgment. *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992); *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). A successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence

excluded or admitted. *GT & MC, Inc. v. Texas City Ref., Inc.*, 822 S.W.2d 252, 257 (Tex. App. — Houston [1st Dist.] 1991, writ denied). We determine whether the case turns on the evidence excluded by reviewing the entire record. *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989); *Alvarado*, 897 S.W.2d at 753-54.

Reviewing the record as a whole, we conclude that the trial court did not abuse its discretion by excluding the challenged evidence. Appellees challenged the introduction of post-operative care testimony on the basis that no evidence was introduced to indicate Mr. Boone's injury was connected to the craniotomy, and that the Boones did not show the craniotomy was unsuccessful or that it in any way triggered the necessity for post-operative instruction. The Boones rely on testimony from their expert, Dr. Pulliam, as evidence Mr. Boone sustained damage as a result of the craniotomy.

The predicate for introduction of this testimony regarding post-operative care was some showing that the craniotomy was unsuccessful and that Boone's damage was, at least in part, caused by the craniotomy. Dr. Pulliam, Boone's own expert, testified, "Nothing in the records, and this is such a relatively straightforward operation, at least as regards exposing the area of damage, that it's hard for me to imagine that Dr. Willman performed that poorly, so it makes it this overwhelming feeling that there was some damage to the brain before Dr. Willman ever started." Absent some evidence that Dr. Willman caused Mr. Boone injury during the craniotomy, testimony regarding the propriety of post-operative instruction concerning brain damage resulting from the craniotomy was properly excluded. Point twenty is overruled.

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WORKER'S COMPENSATION TESTIMONY

In point twenty-one, the Boones challenge the trial court's exclusion of testimony from Mr. Boone regarding his prior worker's compensation claim. Appellees objected to this testimony on the basis of relevance. The Boones contend the testimony was necessary to rebut appellees' implication that Mr. Boone was a malingerer. Our review of the records indicates appellees cross-examined Mr. Boone on the issue of his worker's compensation claim to rebut his characterization of his pre-existing back injury as "minor", not to demonstrate Mr. Boone was a malingerer. Further, appellants presented other testimony controverting any perceived challenge to Mr. Boone's work ethic. Error in the exclusion of evidence does not require reversal if it is cumulative of other evidence. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). Based on the record in the case at bar, Boone's testimony would have been cumulative of other testimony and evidence. Therefore, excluding Boone's testimony would not constitute reversible error. Appellants' twenty-first point is overruled.

POLYGRAPH EXAMINATION

In point twenty-two, the Boones contend the trial court committed reversible error in not allowing the parties to agree to polygraph examinations during trial. The general rule in Texas is that results of a polygraph are not admissible in civil suits. *Texas Farm Bureau Mut. Ins. Co. v. Baker*, 596 S.W.2d 639, 643 (Tex. Civ. App. — Tyler 1980, writ ref'd n.r.e.). We find no error in the trial court's decision to deny counsels' "stipulation" to delay trial in order to locate and

perform polygraph examinations which are not properly admissible as evidence. Point twenty-two is overruled.

C. Charge & Verdict

In point twenty-three, the Boones contend the trial court erred in submitting an improper jury question regarding the damages the Boone children would be entitled to should the jury find liability on the part of appellees. To obtain reversal of the judgment, appellants must show that such error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. Tex. R. App. P. 81(b)(1); *Padgett*, 869 S.W.2d at 537. As the jury absolved appellees of liability, and we have found no reason to disturb that finding, any error in the charge on this point is harmless. Point twenty-three is overruled.

Preponderance of the Evidence

The Boones contend the trial court erred in entering judgment on the verdict because the jury's findings were against the great weight of the evidence in regards to the negligence of appellees Fisher and Willman (point twenty-four), appellant Mr. Boone's negligence (point twenty-five), and the damages awarded (points twenty-six and twenty-seven). In point twenty-eight, the Boones contend the trial court erred in entering an incomplete judgment based on the jury's failure to answer questions predicated upon the issues raised in points twenty-four through twenty-seven.

If a finding is "against the great weight and preponderance of the evidence," the inquiry is whether the finding is so

contrary to the overwhelming weight of all relevant evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986, per curiam); *Hickey v. Couchman*, 797 S.W.2d 103, 110 (Tex. App. — Corpus Christi 1990, writ denied). The applicable standard of review requires us to examine the entire record to determine whether some evidence supports the failure to find, and then determine, in light of the record, whether the failure to find is manifestly unjust. *Silva v. Enz*, 853 S.W.2d 815, 817 (Tex. App. — Corpus Christi 1993, writ denied). We must be mindful that the jury was not convinced on the issue by a preponderance of the evidence, and reversal is warranted only when the great weight of the evidence supports an affirmative answer. *Grenier v. Joe Camp, Inc.*, 900 S.W.2d 848, 851 (Tex. App. — Corpus Christi 1995, no writ).

Mr. Boone suffered from sinus problems most of his life; his problems were so severe he was unable to breathe through his nose and had no sense of smell. He consulted a doctor in 1984 who recommended surgery which Mr. Boone refused. After consulting with other physicians, Mr. Boone was referred to Dr. Fisher in 1989. Finding Mr. Boone suffered from severe nasal polyps which totally obstructed his nasal cavity, Dr. Fisher prescribed medication and recommended nasal surgery (a polypectomy). Following consultation, Mr. Boone consented to the surgery. Though Mr. Boone testified he was not informed of all the risks associated with the polypectomy, Dr. Brown testified that Dr. Fisher's instruction regarding the procedure and its consequences were appropriate. Further, Dr. Fisher's post-operative report confirms his contention that Mr. Boone was properly advised of the possible consequences of the surgery. Mr. Boone signed a medical consent form.

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Dr. Fisher performed the surgery and noted Mr. Boone had the worst case of nasal polyps he had ever seen. Experts testified polyps can weaken and erode the cribriform plate, causing ruptures which would release CSF. Four months following surgery, Mr. Boone returned to the doctor with sinus complaints. Dr. Fisher determined Mr. Boone had a cracked cribriform plate and a CSF leak. Dr. Fisher might have cracked Mr. Boone's cribriform plate during surgery. Experts testified to the likelihood of such an event and the likelihood Dr. Fisher would have noticed a crack during the surgery itself. Dr. Fisher testified he did not crack the plate during surgery, rather that the polyps themselves had deteriorated the plate and caused the leak. Mr. Boone's experts controverted this testimony and testified that chances of polyps causing such deterioration were low.

Upon determination that Mr. Boone had a CSF leak, Dr. Fisher informed Mr. Boone he would need a craniotomy. Dr. Fisher did not hospitalize Mr. Boone for the CSF leak. Testimony conflicted over whether hospitalization was necessary. Dr. Fisher scheduled an MRI following a consultation with Dr. Willman. Concerned over the possibility of meningitis, Dr. Fisher sent Mr. Boone home for bed rest and advised Mr. Boone to notify him immediately if he experienced headache, stiff neck, or fever. Mr. Boone recalled only the instruction regarding stiff neck "or infection." Two days later, with a fever of 103 degrees, Mr. Boone contacted Dr. Fisher who immediately admitted him to the hospital. Mr. Boone had contracted meningitis. Drs. Willman, Fisher, and Bullen recommended a craniotomy which was scheduled for May 25th. Mr. Boone canceled the surgery. Mr. Boone recalls being told he was not a candidate

for surgery until his meningitis cleared up. A CT Scan was performed on May 23, and Mr. Boone was treated with antibiotics. Appellants put on evidence that the medications prescribed were inappropriate for combating meningitis. Mr. Boone was discharged.

Mr. Boone's CSF leak continued. On June 4, Dr. Fisher again discussed surgery with Mr. Boone reiterating the dangers of meningitis. Mr. Boone recalls Dr. Fisher advising him that 70-90% of such cracks heal themselves and that, if his did not, he could have surgery later. Appellees controvert this testimony. Mr. Boone also insists he would have preferred a transnasal patch had he been afforded that option. Appellees testified such an option was considered and rejected as not medically advisable. Both parties introduced argument regarding the advisability of the transnasal patch option.

Mr. Boone was again admitted to the hospital in October for continued CSF leakage. He continued to refuse surgery until December 4th. Dr. Willman finally performed Mr. Boone's craniotomy on December 21. The surgery successfully plugged the CSF leak and Mr. Boone has suffered no further meningitis attacks. He does complain of forgetfulness, temper, frequent urination, and other symptoms of brain damage. Evidence of Mr. Boone's damage was controverted at trial.

Considering the record in its entirety, we cannot say the evidence requires an affirmative answer to the question of negligence regarding appellees' performance, or a negative answer regarding Mr. Boone's own negligence. The jury's

inability to find for the Boones was not clearly wrong or unjust. Without finding for the Boones on the liability issue, we need not consider the damages questions. Having found no harmful error in points twenty-four through twenty-seven, we cannot find error in the jury's failure to answer those questions challenged in point twenty-eight. Points twenty-four through twenty-eight are overruled.

D. JURY SELECTION

In points twenty-nine and thirty, the Boones claim error for the impanelment of two jurors who gave incorrect answers to questions on the juror information form. In response to the question, "[h]ave you ever been an accused, complainant, or witness on a criminal case?," juror Rangel failed to disclose two misdemeanor convictions for driving while intoxicated. In response to the question, "[h]ave you ever been a party to a lawsuit?," juror Baltierra failed to disclose her participation as plaintiff in a class action lawsuit and a personal injury lawsuit. Rule 327 of the Texas Rules of Civil Procedure provides:

> When the ground of a motion for new trial . . . [is] that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof . . . and may grant a new trial if . . . [the] answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and on the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

TEX. R. CIV. P. 327(a).

We must first determine whether the juror's incorrect answers were "material". An answer which would disqualify the juror under government code section 62.105 is *per se* material. *Burton v. R.E. Hable Co.*, 852 S.W.2d 745, 747 (Tex. App. — Tyler 1993, no writ). Neither Mr. Rangel's nor Ms. Baltierra's answers would have disqualified them from jury service under the government code's mandatory provisions. *See* TEX. GOV. CODE ANN. § 62.105. Absent a statutory basis for removal, we will only reverse the trial court's decision if we can find abuse of discretion. *Garza v. Tan*, 849 S.W.2d 430, 432 (Tex. App. — Corpus Christi 1993, no writ). The *Burton* court, faced with a similar question, reviewed the trial record and juror information questionnaires for evidence of materiality. Focusing on how the appellant there had handled other similarly situated venire members, the court was able to deduce that the question was immaterial as appellant had not struck jurors whose circumstances matched the offending juror's.

We cannot employ the *Burton* approach here because the Boones, though citing *Burton* as authority, failed to include the juror information forms for our review. We turn to the record at voir dire and during the hearing on the motion for new trial to help us decide the question. Regarding Mr. Rangel's DWI convictions, we learn that the more recent of the two convictions took place in 1989, some six years before this trial, while the first took place two to four years before the second. Both Mr. Rangel's offenses were misdemeanors. Regarding Ms. Baltierra's prior trial history, Ms. Baltierra answered that she had not been involved in a lawsuit when, in fact, she was a named plaintiff in two suits. She had been involved as plaintiff in a class action against a chemical

company for injuries suffered during an inadvertent chemical release, filed three years before her jury service, and also as minor plaintiff, represented by a next friend, in a personal injury lawsuit in which she was injured in a car wreck at the age of sixteen, about eight years before her jury service. Her knowledge of both lawsuits appeared sketchy, perhaps due, in part, to her status as one of many class action plaintiffs on the one hand, and that her father represented her as next friend due to her minority on the other. She testified she believed both prior cases settled before trial and that she received satisfaction in the form of payment of medical bills from each.

Nothing in the testimony of either juror leads us to conclude the trial court abused its discretion in finding the questions were immaterial. Mr. Rangel's six- to ten-year-old misdemeanor criminal offenses bear little relationship to the case at hand. Ms. Baltierra's attenuated involvement in lawsuits as a minor on the one hand and as one of many class action plaintiffs on the other gives us little cause to find prejudice or bias *per se*. Appellants offer no basis for the proposition that a venire member's inaccurate or misleading answer to a voir dire question is *per se* grounds for removal or cause for reversal, nor do they demonstrate how the jurors' omissions harmed them in this lawsuit. Points twenty-nine and thirty are overruled.

In point thirty-one, the Boones complain the trial court abused its discretion in limiting voir dire questions regarding the O.J. Simpson trial. Claiming the unique nature of the Simpson trial would afford an opportunity to discover information regarding the venire member's biases in the most

efficient manner available, the Boones argue they were harmed in their ability to properly exercise their peremptory challenges and strikes. The latitude which counsel will be allowed in conducting voir dire is largely within the discretion of the trial court and will only be reversed for abuse of discretion. *Flores v. Texas Employers Ins. Assoc.*, 515 S.W.2d 938, 939 (Tex. Civ. App. — El Paso 1974, no writ). A party has a right to ask proper questions on voir dire (1) to determine whether grounds exist to challenge a juror for cause and (2) to gather information to make intelligent use of peremptory challenges. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App. — Houston [14th Dist.] 1993, writ denied). It is an abuse of discretion to deny that right. *Id.* The trial court has the inherent power to control the disposition of cases on its docket with economy of time and effort for itself, for counsel, and for litigants. *Metzger v. Sebek*, 892 S.W.2d 20, 37 (Tex. App. — Houston [1st Dist.] 1994, writ denied).

In their motion for new trial, appellants state their purpose for the line of questioning regarding the Simpson trial was to uncover bias in those venire members who might have revealed they had made up their minds regarding Simpson's guilt before the evidence was fully presented. The Boones contend this line of questioning was the most efficient way to achieve their goal. The Boones do not explain, nor does the record reveal, why they believe this was the most efficacious line of questioning. Considering the dissimilarity between this civil action and the Simpson criminal trial, appellants' rather general goal, the absence of a bill of exception, and the court's inherent power to control its docket, we cannot conclude the trial court was clearly

wrong to limit appellants' questions, nor that there exists a strong probability of harm. Point thirty-one is overruled.

In point thirty-two, the Boones complain the trial court gave them too little time to properly exercise their challenges to the jury panel. The time afforded for preparing challenges rests within the discretion of the trial court. The record shows the court set aside at least twenty minutes in which to hear and decide jury challenges. Appellants provide us with no compelling explanation why the time allotted was insufficient or unreasonable. We find no abuse of discretion. Point thirty-two is overruled.

E. FAIR TRIAL

By their thirty-third point, the Boones contend the trial court abused its discretion by ordering their expert witnesses deposed in Nueces County. Texas Rule of Civil Procedure 201 provides that the time and place designated for deposing witnesses shall be reasonable. This rule further requires that the deposition shall be taken: (1) in the county of the witness's residence; (2) in the county where the witness is employed or regularly transacts business; or (3) at such other convenient place as may be directed by the court in which the cause is pending. TEX. R. CIV. P. 201(5).

The record reveals the trial court gave no consideration to the reasonableness or the convenience of the place of the deposition of the witnesses. This constitutes an abuse of discretion on the part of the court contrary to rule 201(5). *See Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988); *Borden, Inc. v. Valdez*, 773 S.W.2d 718, 721

(Tex. App. — Corpus Christi 1989, no writ) (no evidence presented at trial to show it was reasonable or otherwise convenient for foreign deponent to travel to forum county).

Having concluded there was an abuse of discretion, we must also find harm in order to reverse.

To obtain reversal of judgment, appellants must show that such error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. TEX. R. APP. P. 81(b)(1); *Padgett*, 869 S.W.2d at 537. The Boones contend they were forced to forego calling some of their experts at trial because of the increased expense associated with having the experts made available for deposition in Nueces County; the Boones have not shown, however, that the testimony of the absent experts altered the outcome of the trial. Consequently, point thirty-three is overruled.

DISCOVERY

In point thirty-four appellants complain the trial court abused its discretion by protecting Humana Health Plan, the HMO originally a party to this lawsuit, from disclosure of its physicians fee schedule. The Boones contend the HMO's fee schedule encouraged medical malpractice generally. While appellees disclosed that portion of the fee schedule pertaining to the services and procedures they provided Mr. Boone, appellants sought production of the schedule in its entirety. Appellees objected on the grounds of relevance, burdensomeness, and privilege. The trial court granted protection on the basis that such a request was overly broad and unduly burdensome.

Appendix A

Generally, discovery is permitted into any matter, not privileged, that is relevant to the subject matter and is "reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 166b(2)(a); *see also Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984, orig. proceeding). This broad grant is limited by the legitimate interests of the opposing party to avoid overly broad requests, harassment, or disclosure of privileged information. *Jampole*, 673 S.W.2d at 573. Thus, the trial court has discretion to narrow the scope of discovery on a case-by-case basis with a protective order. *See* TEX. R. CIV. P. 166b(5).

The twenty-four pages of the record dedicated to this issue show the trial court considered: (1) that appellees disclosed the portion of the fee schedule pertinent to Boone's treatment; (2) that Humana Health Plan asserted the privilege of confidentiality; (3) the relevance of the requested material to the pleadings; and (4) the Boones' need for the additional fee schedule information. We first note the Boones settled with Humana Health Plan and, accordingly, Humana is not a party to this appeal. Our supreme court in *City of West Univ. Place v. Martin*, 132 Tex. 354, 123 S.W.2d 638, 639 (1939) said, "The rule is generally accepted that appellate courts do not decide cases where no actual controversy exists between the parties at the time of the hearing." Any relief requested as may pertain to Humana is moot. Insofar as there is an issue regarding application of the entire fee schedule to the appellees, we do not agree that the trial court abused its discretion. The trial court permitted discovery of those portions of the fee schedule relevant to appellees. The record indicates the trial court's decision to exclude the remainder of the schedule was based on balancing the interests and

rights of the parties. Further, appellants have not shown how the error complained of was reasonably calculated to cause rendition of an improper judgment. TEX. R. APP. P. 81(b)(1). Point thirty-four is overruled.

RIGHT TO OBJECT

The Boones contend, in their thirty-fifth point of error, the trial court erred by refusing to allow counsel to properly object to evidence and thereby prevented preservation of error. The objection relates to counsel's question posed to Mr. Boone on recross-examination regarding whether he remembered the testimony in which Mr. Boone's own expert, Dr. Pulliam, testified that Mr. Boone was negligent in failing to follow his doctors' advice. The passage appellants cite reads:

> [MR. BARGER] Now, my question is, do you think, sir, that you have any responsibility for your actions, for failing to follow sound medical advice as your own paid expert has testified that you should have done?
>
> [THE COURT] Your objection is overruled. Take your seat, Mr. Wavell.
>
> [MR. WAVELL] May I make the objection?
>
> [THE COURT] Take your seat, Mr. Wavell.
>
> . . .

> [MR. WAVELL] Judge, I feel like to protect the record I need to make the objection.
>
> [THE COURT] You have protected the record abundantly, each step of the way. Now, let's hear the question and let's hear the answer so we can go on to other matters.
>
> . . .
>
> [MR. WAVELL] Can I have a running objection to these questions?
>
> [THE COURT] Yes, sir. You can have a running objection.

Clearly, a party must raise an objection to preserve error for appeal. *See* TEX. R. APP. P. 52. We note that during appellees' counsel's nine attempts to ask his question, appellants objected four times; first, because appellee mispronounced the expert's name; second, because he felt counsel was standing too close to the witness; third, because he felt appellees' question was misleading; and fourth, because appellees' question was repetitive. During this series of questions, Mr. Boone complained appellees' counsel was too loud and, on several occasions, that he did not understand appellees' question. Mr. Boone was twice cautioned by the court to listen carefully and answer only the question asked. The record reflects the tension, if not rancor, between the parties.

Although the trial court's frustration is understandable, rule 52 nonetheless places a burden on counsel to object

where necessary. An obligation of counsel to object on the one hand is valueless without a corresponding duty of the court to hear the objection. Rule 52 and our notions of due process lead us to conclude the trial court committed error in not allowing the Boones to make their objection.

Next, we determine if the Boones were harmed by this error. The record demonstrates Mr. Boone never answered the question Mr. Wavell found objectionable. Further, the trial court permitted appellants' running objection. We cannot conclude the trial court's error altered the outcome of the trial. TEX. R. APP. P. 81(b)(1). Point thirty-five is overruled.

F. TRIAL COURT BIAS AND FAIR TRIAL

JUDGE'S DEPARTURE FROM THE BENCH

Appellants dedicate points thirty-six, forty-three, and forty-four to complain of the trial judge's departure from the bench while jurors remained in the courtroom. The Boones claim harm from violation of the Code of Judicial Conduct, due process, and demonstration of bias leading to denial of a fair trial. We address these points together.

We note that, though appellants have dedicated three points of error to this issue, the only portion of their brief dealing with this issue is a single sentence reading: "Additionally, a judge leaving the bench has been recited as prejudicial conduct negating a fair trial. *Shaw*, *supra*." We refer to that portion of the record containing testimony adduced during the hearing directed by this Court to develop

an agreed statement of facts. First, the Boones' counsel testified that jurors were present in the courtroom following the trial judge's recess and departure at 5 p.m. one Friday during trial. This testimony is controverted by appellees' counsel. Second, we note appellants did not object or bring this matter to the trial court's attention when trial resumed the following Monday. Third, appellants did not request a curative instruction for the jury regarding any harm occasioned by the judge's departure. Finally, the Boones have not demonstrated what harm was visited upon them by this event. *See* TEX. R. APP. P. 81(b)(1).

Our review of case law disclosed only four opinions on point since the inception of the Code of Judicial Conduct in September of 1974. Only two of those opinions involved reversal, and in both cases the trial court's behavior can best be described as egregious and outrageous. *See Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d 204, 211 (Tex. App. — Corpus Christi 1990, no writ) (attorneys for both sides held in contempt, counsel requested to pay money to "charity" — a hospitalized friend of the judge, loud argument between counsel and the court in the jury's presence, judge left the bench threatening to strike all pleadings); *Kramer Trading Corp. of Tex. v. Lyons*, 740 S.W.2d 522, 524 (Tex. App. — Houston [1st Dist.] 1987, no writ) (trial court terminated hearing before plaintiff rested and before defendant presented his case). Nothing contained in the record remotely indicates Judge Bennett acted in such an outrageous manner during this trial.

Outrageous behavior aside, the Boones cite Canon 3 of the Code of Judicial Conduct, entitled "Performing the Duties

of Judicial Office Impartially and Diligently." This Canon sets forth the standards that apply to a judge in performing his duties. For example, Canon 3 requires a judge to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . . ." TEX. CODE JUD. CONDUCT, Canon 3(B)(4), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 1998). A judge must also perform his duties without bias or prejudice. TEX. CODE JUD. CONDUCT, Canon 3(B)(5). The Boones imply that violation of any of the standards set out in Canon 3 is reversible error *per se*. We do not agree.

Canon 8 describes the intent of the Code:

> The code is designed to provide guidance to judges and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.
>
> It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and

> the effect of the improper activity on others or on the judicial system.

TEX. CODE JUD. CONDUCT, Canon 8(A). Thus, a judge may be disciplined for violating one of these rules, but a violation does not necessarily mean the judge has committed reversible error. After reviewing the record, we do not find Judge Bennett's behavior indicates bias towards or against the parties to this lawsuit. Points thirty-six, forty-three, and forty-four are overruled.

RIGHT TO BE HEARD

Points thirty-seven and forty-five address the contention that the trial court abused its discretion and violated the Code of Judicial Conduct by failing to afford the Boones the right to be heard through counsel. No authority or argument is presented on these points. Consequently, nothing is presented for review. *See* TEX. R. APP. P. 47(f). Points thirty-seven and forty-five are overruled.

PATIENCE AND COURTESY

Points thirty-eight and forty-six address the Boones' contention that the trial court abused its discretion and violated the Code of Judicial Conduct by failing to show patience and courtesy to the Boones and their counsel. The Boones first address, again, Judge Bennett's departure from the bench following trial on Friday, the 28th. Appellants' chief contention seems to be that Judge Bennett displayed a lack of courtesy to appellants by interrupting appellees' cross-examination of the Boones' expert witness promptly

at 5 p.m., recessing, and rapidly exiting the courtroom despite Mr. Wavell's best efforts to speak with him. Mr. Wavell evidently wished to postpone recess and continue the cross-examination of his expert in hopes the expert would not be required to return from Maryland to conclude his testimony the following Monday. Appellants contend the trial court's behavior demonstrates a lack of courtesy for the Boones and their counsel in front of some members of the jury. A review of the record reveals no apparent discourtesy on the part of Judge Bennett. The record shows Judge Bennett recessed court at or near 5 p.m. each day of the trial, typically interrupting the examination of a witness to do so. Throughout the trial, appellants and appellees received similar treatment.

Appellants direct our attention to several other instances where some slight or discourtesy is perceived, but we cannot find error. In a number of the instances referenced, appellants find offense where the trial court sustained appellants' objections but then directed counsel Wavell to take his seat. Indeed, appellants complain of at least ten separate instances in which the trial court directed Mr. Wavell to take his seat following an objection, and even cite one instance in which *opposing* counsel was instructed to sit down following an objection. Appellants' citations to the record make it readily apparent Judge Bennett does not approve of attorneys standing when not examining witnesses. We do not accept this as evidence of discourtesy, bias, disrespect, or intolerance. While we recognize the limits of extracting emotional content or demeanor from the printed page, we are limited to the words contained in the record and the context in which we find them. The record itself conveys no discourtesy or bias on the part of the trial court. Our prior analysis of the Code

of Judicial Conduct applies to the Boones' argument here, as well. Points thirty-eight and forty-six are overruled.

BIAS AND PREJUDICE

In point thirty-nine, the Boones complain the trial court erred and abused its discretion by exhibiting bias and prejudice during the course of the trial. Again, as often in this appeal, appellants cite generally to the "Entire Record". Point forty challenges the trial court's abuse of discretion in presiding over the trial in an unfair and partial manner. Points forty-one and forty-two reiterate points thirty-nine and forty but bring the challenge by way of due process. We are unable to differentiate these challenges in any meaningful way and will address them together.

While we dealt with appellants' individual points separately, the issue of the trial court's bias and prejudice against the Boones represents the core of appellants' complaints relating to points thirty-three through forty-six. We begin by noting that an appellate court will normally consider only a trial judge's rulings and not his predilections. Appellants' remedy is to assign error concerning individual adverse rulings. *Grider v. Boston Co., Inc.*, 773 S.W.2d 338, 346 (Tex. App. — Dallas 1989, writ denied). Only in extraordinary circumstances will we reverse a judgment based on an allegation of judicial bias.

To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party. TEX. R. APP. P. 81(b);

Pitt v. Bradford Farms, 843 S.W.2d 705, 706 (Tex. App. — Corpus Christi 1992, no writ); *Brown v. Russell*, 703 S.W.2d 843, 847 (Tex. App. — Fort Worth 1986, no writ). We examine the entire record to determine whether these factors are present. *Pitt*, 843 S.W.2d at 706-07.

In general, the record shows the majority of interactions between Judge Bennett and the Boones and their attorneys were innocuous. In some instances, the disagreements between counsel and court were unpleasant, marked by sharpness on both sides. Occasionally, the judge was curt, terse, or short with the Boones' attorneys. Judge Bennett sometimes lost his patience with them over the course of the trial.

Nor is there any doubt that the behavior of Mr. Boone and his attorneys sorely tested the judge's patience. For example, the Boones' attorneys repeatedly quibbled with opposing counsel and the court, violated the order in limine and other orders of the court; interrupted the judge; audibly commented on rulings; and attempted to mislead the judge. Mr. Boone himself required repeated instruction and admonition during cross-examination. In short, appellants invited the irritation shown them by the court.

Judge Bennett's disposition may indeed have created an impression in the minds of the jurors that the judge was impatient and annoyed at the behavior of the Boones' counsel. As noted, counsel contributed to Judge Bennett's mood. We find no evidence, however, that the judge's impatience was elevated to the level of bias against the Boones or their attorneys. There is no evidence Judge Bennett behaved less than impartially. Judge Bennett's comments

and actions were largely concerned with his duties and responsibilities in conducting the trial process.

We hold that the Boones have not shown the prejudice required for us to reverse and remand on this ground. *See Pitt*, 843 S.W.2d at 706; *Metzger*, 892 S.W.2d at 39-40. Consequently, we overrule points thirty-nine through forty-two.

G. Cumulative Error

The Boones, in their forty-seventh point, contend the trial court's errors, considered together, had the effect of denying them a fair trial by "stacking the deck" against them.

Multiple errors, even if considered harmless if taken separately, may result in reversal and remand for new trial if the cumulative effect of the errors is harmful; that is particularly true when the errors interact with each other, at least to some extent, augmenting even their combined individual effects. *Texas Health Enters., Inc. v. Krell*, 828 S.W.2d 192, 210 (Tex. App. — Corpus Christi 1992), *vacated by agr.*, 830 S.W.2d 922 (Tex. 1992), citing *Scoggins v. Curtiss & Taylor*, 148 Tex. 15, 219 S.W.2d 451, 454 (1949). Before a judgment will be reversed and a new trial ordered for cumulative error, an appellate court must determine that the error committed by the trial court was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Brown v. Hopkins*, 921 S.W.2d 306, 320 (Tex. App. — Corpus Christi 1996, no writ); *Ramos v. Champlin Petroleum Co.*, 750 S.W.2d 873, 877 (Tex. App. — Corpus Christi 1988, writ denied). In order to

prevail on a cumulative error point, the appellant must show that based on the record as a whole, but for the alleged errors, the jury would have rendered a verdict favorable to appellant. *See* TEX. R. APP. P. 81(b)(1).

After reviewing the entire record, we conclude that the trial court's errors did not cause the rendition of an improper verdict. Here, even considering the "cumulative effect" of all of the judge's comments, we cannot say that the Boones' right to a fair trial was compromised by the court's behavior. Those instances where the court showed less patience or decorum than it should have do not amount to reversible error. Accordingly, we overrule the Boones' forty-seventh point of error and AFFIRM the judgment of the trial court.

s/ J. Bonner Dorsey
J. BONNER DORSEY,
Justice

Opinion delivered and filed
this 28th day of January, 1999.

Appendix A

COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 28th day of January, 1999. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-96-001-CV
(Tr.Ct.No. 92-1783-G)

DOUGLAS A. BOONE, DENYSE ANN BOONE, AND ANTHONY TROY BOONE,

Appellants,

v.

GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., AND NEUROSURGERY, P.A.,

Appellees.

On appeal to this Court from Nueces County, Texas.

JUDGMENT

Appendix A

On appeal from the 319th District Court of Nueces County, Texas, from a judgment signed September 1, 1995. Opinion by Justice J. Bonner Dorsey. Do not publish. Tex. R. App. P. 47.3.

THIS CAUSE was submitted to the Court on January 8, 1997, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellants, DOUGLAS A. BOONE, DENYSE ANN BOONE, AND ANTHONY TROY BOONE.

Costs of the appeal are adjudged against appellants, Douglas A. Boone, Denyse Ann Boone, and Anthony Troy Boone, and Merchants Bonding Company Mutual, as surety on the cost bond. It is further ordered that this decision be certified below for observance.

CATHY WILBORN, CLERK

APPENDIX B — OPINION OF THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS, CORPUS CHRISTI OVERRULING MOTION FOR REHEARING DATED JUNE 22, 2000

NUMBER 13-96-001-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

DOUGLAS A. BOONE, DENYSE ANN BOONE, AND ANTHONY TROY BOONE,

Appellants,

v.

GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., AND NEUROSURGERY, P.A.,

Appellees.

On appeal from the 319th District Court of Nueces County, Texas.

OPINION OVERRULING MOTION FOR REHEARING

Before Justices Dorsey, Hinojosa, and Yañez
Opinion by Justice Dorsey

Appellants have filed a motion to supplement the record on appeal and a motion for rehearing. We have granted the motion to supplement the record, and have considered the

supplemented material in determining the motion for rehearing. We overrule appellants' motion for rehearing and affirm the judgment.

Appellants contend that they had no notice that the deposition of Dr. Karl Swann was not included in the appellate record until receiving the opinion of this Court handed down on January 28, 1999. That deposition was relevant to two of their forty-seven points of error. Because we find that appellants exercised diligence in ensuring that a complete record was presented to this Court, we have granted their motion to supplement, and supplemented the record with that deposition. *See* TEX. R. APP. P. 50(e) (former rules); *Melendez v. State*, 936 S.W.2d 287, 295 (Tex. Crim. App. 1996).

Dr. Swann is an expert neurologist originally hired by the defense. Appellants, who were the plaintiffs at trial, called him to testify at trial by deposition. The trial court excluded certain portions of his deposition testimony that related to what Dr. Swann, personally, would have done differently than the defendant medical professionals. The defendants had obtained a pre-trial ruling that plaintiffs not be allowed to ask questions eliciting that information.

Appellants argued on appeal that the trial court erred in refusing to admit those portions of Dr. Swann's testimony. In our original opinion, we held that appellants waived that issue because Dr. Swann's deposition was not made a part of the record.

Upon receiving the opinion of this Court, appellants brought a motion to supplement the record with Swann's

deposition. We have granted that motion, and reconsidered the affected issues with the benefit of the supplemented deposition. We hold that it was not error to exclude the evidence regarding what Dr. Swann personally would have done and overrule appellants point of error. Because the disposition of the case is the same, we do not withdraw our original opinion, but direct that this opinion serve as a supplement to the original opinion on the issues related to Dr. Swann's deposition testimony.

Complaints of improperly excluded evidence are reviewed under the abuse of discretion standard. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles, *i.e.*, whether the act was arbitrary and unreasonable. *See Texas Dept. of Public Safety v. Jennings*, 1 S.W.3d 348, 351 (Tex. App. — Corpus Christi 1999, no pet. h.).

It is well established that a medical expert may not testify regarding what he would have done in the same circumstances, or what the hypothetically prudent medical professional would have done. *Snow v. Bond*, 438 S.W.2d 549, 550-51 (Tex. 1969); *accord Coan v. Winters*, 646 S.W.2d 655, 657-58 (Tex. App. — Fort Worth 1983, writ ref'd n.r.e.); *Martin v. Petta*, 694 S.W.2d 233, 238 (Tex. App. — Fort Worth 1985, writ ref'd n.r.e.); *Burks v. Meredith*, 546 S.W.2d 366 (Tex. Civ. App. — Waco 1976, writ ref'd n.r.e.). The rationale for that rule was explained by the Texas Supreme Court in *Snow*:

> What constitutes negligence or malpractice is a mixed question of law and fact that can only

> be determined by the trier of fact on the basis of evidence admitted and instructions given by the court. A medical expert is not competent to express an opinion thereon. . . . The question of what a reasonable and prudent doctor would have done under the same or similar circumstances must also be determined by the trier of fact after being advised concerning the medical standards of practice and treatment in the particular case. An expert witness can and should give information about these standards without summarizing, qualifying or embellishing his evidence with expressions of opinion as to the conduct that might be expected of a hypothetical doctor similarly situated. The latter is not an appropriate subject for expert testimony. . . .

Snow, 438 S.W.2d at 550-51. Accordingly, we find that the evidence was properly excluded.

We find no merit in any other points raised in appellants' motion for rehearing and thus, deny the motion. The judgment is AFFIRMED.

J. BONNER DORSEY,
Justice

Opinion delivered and filed this
22nd day of June, 2000.

APPENDIX C — FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT, 319TH JUDICIAL DISTRICT, NUECES COUNTY, TEXAS DATED JULY 17, 1996

IN THE DISTRICT COURT
319TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

CAUSE NO. 92-1783-G

DOUGLAS A. BOONE, ET AL

VS.

GEORGE FISHER, M.D., ET AL

FINDINGS AND CONCLUSIONS

The above-captioned cause came on for hearing before the Court on July 16, 1996. The attorneys for all parties were present and this Court heard evidence, arguments and authorities regarding the issues in the Court of Appeals' Order of April 25, 1996. Pursuant to the Court of Appeals' Order, this Court makes the following findings and conclusions:

1. The statement of facts accurately recorded the proceedings at trial;

2. Appellants/Plaintiffs did not properly request that a record be made of the bench conferences and of the open court exchange;

Appendix C

3. The Appellants/Plaintiffs did not object to the court reporter's failure to record the bench conferences and the open court exchange; and

4. The referred to open court exchange did not occur when the court was in session; the court had adjourned for the day.

Entered this the 17 day of July, 1996.

s/ [illegible]
JUDGE PRESIDING

APPENDIX D — PER CURIAM ORDER OF THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS, CORPUS CHRISTI DATED APRIL 25, 1996

NUMBER 13-96-001-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

DOUGLAS A. BOONE, DENYSE ANN BOONE, AND ANTHONY TROY BOONE,

Appellant,

v.

GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., AND NEUROSURGERY, P.A.,

Appellees.

On appeal from the 319th District Court of Nueces County, Texas.

ORDER

Before Justices Hinojosa, Yañez, and Chavez
Order Per Curiam

Appellants contend that the court reporter omitted from the statement of facts several bench conferences and one open court exchange in the presence of the jury, and that they need these proceedings in order to prosecute their appeal.

Appendix D

Accordingly, appellants request this Court, under the authority of Texas Rule of Appellate Procedure 55(a), to abate the appeal and remand to the trial court to make the statement of facts conform to the proceedings at trial. Appellees have opposed the motion generally on the ground that appellants waived any right to a record of such conferences or proceedings by failing to object at trial to the court reporter's failure to record them.

We grant the appellants' motion, and hereby order the present appeal abated and remanded for the trial court to hear and determine whether the statement of facts accurately recorded the proceedings at trial, and whether appellants properly requested that a record be made of the bench conferences and of the open court exchange or objected to the court reporter's failure to make such a record. We further order the trial court to transmit its findings and conclusions to this Court immediately after such hearing by means of a supplemental transcript.

PER CURIAM

Order delivered and filed this
the 25th day of April, 1996.

APPENDIX E — FINAL JUDGMENT OF THE DISTRICT COURT, 319TH JUDICIAL DISTRICT, NUECES COUNTY, TEXAS DATED JULY 14, 1995

IN THE DISTRICT COURT
319TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

CAUSE NO. 92-1783-G

DOUGLAS A. BOONE, DENYSE ANNE BOONE, AND ANTHONY TROY BOONE

VS.

GEORGE FISHER, M.D., BLAKE B. O'LAVIN, M.D., PHILIP J. A. WILLMAN, M.D., THE NEUROLOGICAL CLINIC, HUMANA HOSPITAL CORPUS CHRISTI, LOBG, DOCTORS REGIONAL MEDICAL CENTER, HUMANA HEALTH PLAN OF TEXAS, INC., DBA/AKA HUMANA HEALTH PLAN OF CORPUS CHRISTI, NEUROSURGERY P.A., AND NEUROLOGY P.A.

FINAL JUDGMENT

BE IT REMEMBERED that on this the 14th day of July, 1995, came on to be heard the above entitled and numbered cause, and thereupon came the parties by and through their attorneys of record and announced to the Court that all matters at issue in this case have been compromised and settled, that a release in full has been executed by the Plaintiffs, and the consideration for such release paid by Galen Hospital Corporation, Inc. d/b/a Doctors Regional Medical Center (formerly known as Humana Hospital Corpus

Christi) so that Plaintiffs and Defendant Galen Hospital Corporation, Inc. d/b/a Doctors Regional Medical Center no longer have any cause of action of any kind or character against each other and the Court was thereupon requested to enter a judgment that the Plaintiffs take nothing, and it appearing to the Court that such judgment should be entered;

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Douglas A. Boone, Denyse Anne Boone, and Anthony Troy Boone take nothing and that they go hence without day.

One-third of court costs incurred through June 26, 1995, are taxed against Defendant, for which let execution issue if same are not timely paid.

SIGNED AND ORDERED ENTERED this 14th day of July, 1995.

s/ [illegible]
JUDGE PRESIDING

APPROVED AS TO SUBSTANCE AND FORM:

By: s/ Michael K. Marsh
Michael K. Marsh
State Bar No. 13018400

ATTORNEY-IN-CHARGE FOR DEFENDANT
GALEN HOSPITAL CORPORATION, INC.
D/B/A DOCTORS REGIONAL MEDICAL
CENTER (FORMERLY KNOWN AS HUMANA
HOSPITAL CORPUS CHRISTI)

Appendix E

OF COUNSEL:

MEREDITH, DONNELL & ABERNETHY
1500 One Shoreline Plaza, North Tower
Post Office Box 2624
Corpus Christi, Texas 78403-2624
Telephone No.: (512) 888-5551
Telecopier No.: (512) 880-5717

One Shoreline Plaza
800 North Shoreline
Suite 320, South Tower
Corpus Christi, Texas 78401

By: s/ Cage Wavell
Cage Wavell
State Bar No. 20988250

ATTORNEYS FOR PLAINTIFFS

APPENDIX F — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED SEPTEMBER 14, 2000

THE SUPREME COURT OF TEXAS
POST OFFICE BOX 12248
AUSTIN, TEXAS 78711
(512) 463-1312

September 14, 2000

Mr. Cage Wavell
Cage Wavell & Associates
800 N. Shoreline,
Suite 1400 S.
Corpus Christi, TX 78401

Ms. Deborah R. Sundermann
712 American Bank Plaza
Corpus Christi, TX 78475

Mr. Carlos Villarreal
Hunt Hermansen McKibben
& Villarreal
555 North Carancahua,
Suite 1100
Corpus Christi, TX 78478

Mr. Thomas F. Nye
Brin & Brin
1202 Third Street
Corpus Christi, TX 78404

RE: Case Number 00-0817
Court of Appeals Number: 13-96-00001-CV
Trial Court Number: 92-1783-G

Style: DOUGLAS A. BOONE, DENYSE ANNE BOONE, and ANTHONY TROY BOONE
v.
GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., and NEUROSURGERY, P.A.

Appendix F

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by s/ Gena Pelham
Gena Pelham, Deputy

cc: Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz

APPENDIX G — LETTER OF THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING DATED NOVEMBER 2, 2000

THE SUPREME COURT OF TEXAS
POST OFFICE BOX 12248
AUSTIN, TEXAS 78711
(512) 463-1312

November 02, 2000

Mr. Cage Wavell
Cage Wavell & Associates
800 N. Shoreline,
Suite 1400 S.
Corpus Christi, TX 78401

Ms. Deborah R. Sundermann
712 American Bank Plaza
Corpus Christi, TX 78475

Mr. Carlos Villarreal
Hunt Hermansen McKibben
& Villarreal
555 North Carancahua,
Suite 1100
Corpus Christi, TX 78478

Mr. Thomas F. Nye
Brin & Brin
1202 Third Street
Corpus Christi, TX 78404

RE: Case Number 00-0817
Court of Appeals Number: 13-96-00001-CV
Trial Court Number: 92-1783-G

Style: DOUGLAS A. BOONE, DENYSE ANNE BOONE, and ANTHONY TROY BOONE
v.
GEORGE FISHER, M.D., PHILIP J. A. WILLMAN, M.D., and NEUROSURGERY, P.A.

Appendix G

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz

APPENDIX H — CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

Texas Const., Art. 1, § 13

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CONSTITUTION OF THE STATE OF TEXAS 1876
ARTICLE I. BILL OF RIGHTS

§ 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

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Appendix H

Tex. Gov't. Code Ann. § 52.041

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
GOVERNMENT CODE
TITLE 2. JUDICIAL BRANCH
SUBTITLE D. JUDICIAL PERSONNEL AND OFFICIALS
CHAPTER 52. COURT REPORTERS
SUBCHAPTER D. APPOINTMENT AND POWERS AND DUTIES OF OFFICIAL COURT REPORTERS

§ 52.041. Appointment of Official Court Reporter

Each judge of a court of record shall appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court.

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Tex. Gov't. Code Ann. § 52.045

§ 52.045. Oath

(a) An official court reporter must take the official oath required of officers of this state.

(b) In addition to the official oath, each official court reporter must sign an oath administered by the district clerk stating that in each reported case the court reporter will keep a correct, impartial record of:

(1) the evidence offered in the case;

(2) the objections and exceptions made by the parties to the case; and

(3) the rulings and remarks made by the court in determining the admissibility of testimony presented in the case.

* * *

Tex. Gov't. Code Ann. § 52.046

§ 52.046. General Powers and Duties

(a) On request, an official court reporter shall:

(1) attend all sessions of the court;

(2) take full shorthand notes of oral testimony offered before the court, including objections made to the admissibility of evidence, court rulings and remarks on the objections, and exceptions to the rulings;

(3) take full shorthand notes of closing arguments if requested to do so by the attorney of a party to the case, including objections to the arguments, court rulings and remarks on the objections, and exceptions to the rulings;

(4) preserve the notes for future reference for three years from the date on which they were taken; and

(5) furnish a transcript of the reported evidence or other proceedings, in whole or in part, as provided by this chapter.

(b) An official court reporter of a district court may conduct the deposition of witnesses, receive, execute, and return commissions, and make a certificate of the proceedings in any county that is included in the judicial district of that court.

(c) The supreme court may adopt rules consistent with the relevant statutes to provide for the duties and fees of official court reporters in all civil judicial proceedings.

(d) A judge of a county court or county court at law shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court.

* * *

RULE 11

RULE 11. DUTIES OF COURT REPORTERS

(a) The duties of official court reporters shall be performed under supervision of the presiding judge of the court and shall include, but not be limited to:

(1) attending all sessions of court and making a full record of the evidence when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court thereon;

(2) making a full record of jury arguments and voir dire examinations when requested to do so by the attorney for any party to a case, together with all objections to such arguments, the rulings and remarks of the court thereon;

(3) filing all exhibits with the clerk;

(4) preparing official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court; and

(5) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

(b) Exhibits and materials used in the trial of a case and all of the record in a case are subject to such orders as the court may enter thereon.

(c) In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.

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(d) When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

(Adopted by the Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)